SUPREME COURT, U. S.
No. 171
Office-Supreme Court, U.S.
FILED
JUL 15 1968
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C., 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RONALD R. HELVESTON,
Attorney,
National Labor Relations Board,
Washington, D. C., 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

National Labor Relations Board v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175	5
National Labor Relations Board v. *Brown & Sharpe Mfg. Co.*, 169 F. 2d 331	8
National Labor Relations Board v. *Cousins Associates, Inc.*, 283 F. 2d 242	8
National Labor Relations Board v. *Industrial Union of Marine and Shipbuilding Workers*, No. 796, October Term, 1967, decided May 27, 1968	6
National Labor Relations Board v. *Overnite Transportation Co.*, 308 F. 2d 284	8
National Labor Relations Board v. *Spector Freight System*, 273 F. 2d 272, certiorari denied, 362 U.S. 962	6
Poultry Enterprises, Inc. v. *National Labor Relations Board*, 216 F. 2d 798	8
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	5-6

Cases—continued	Page
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	6
F. W. Woolworth Co. v. *National Labor Relations Board*, 121 F. 2d 658	7
Statutes:	
National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	2
Section 2(11)	5, 7
Section 8(b)(1)(A)	5
Section 8(b)(2)	5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 171

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals enforced the Board's order without opinion (Pet. App. 31). The Board's decision and order (Pet. App. 11-30) are reported at 162 NLRB No. 58.

JURISDICTION

The decree of the court of appeals was entered on March 11, 1968 (Pet. App. 31-32). The petition for a

writ of certiorari was filed on June 7, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union caused several employers to deny employment to Eugene McClain because his union membership had been terminated for failure to pay a union fine.

2. Whether substantial evidence supports the Board's finding that McClain was not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 8-10 of the petition.

STATEMENT

Eugene McClain, a cement finisher, was a member of petitioner union from 1952 until December 1965, at which time he was dropped from membership for failing to pay a $1,000 fine imposed by the union. The fine was the result of an internal union proceeding initiated by charges alleging that McClain, after an argument with petitioner's business agent, James Burke, assaulted Burke with his fist (Pet. App. 17; B.A. 31-33, 85-89).[1] At a union meeting shortly after

[1] "B.A." refers to the Board Appendix in the court below, which is part of the record filed in this Court.

McClain was dropped from the union, business agent Burke instructed members to stop work any time McClain was employed on the same project with them (Pet. App. 21-23; B.A. 66-70).

On January 14, 1966, McClain reported for work at a job site where Wilmorite Construction Inc. was the general contractor and Chloris Associates Inc. a subcontractor (Pet. App. 17-18; B.A. 27).[2] Sometime thereafter, Wilmorite's general superintendent, Russell, learned from the mason superintendent that "there was a problem with the bricklayers" (Pet. App. 18-19; B.A. 50). Russell sought out petitioner's steward, Bruce Bart, who told Russell that "he had been in touch with the International and Local Union and that he was under orders to notify Wilmorite that [the bricklayers] would use the mortar that was on the job and work until noon, because McClain was on the job and he was no longer a member of the union" (Pet. App. 18-19; B.A. 50).

McClain was told to report to Russell, who asked him if he was having trouble with the union over his dues payments. To show that he was not delinquent McClain showed Russell his union book, which indicated that his dues had been paid through December 31.[3] Russell replied, "Well, something is wrong," and McClain suggested that he call Bart. When Bart ap-

---

[2] Wilmorite and Chloris were parties to the collective bargaining agreement between the Building Trades Employers Association of Rochester and petitioner union. (Pet. App. 17-18; B.A. 27.)

[3] It is undisputed that the union allows its members a 60 day grace period in which to pay dues, and that McClain's January 25, 1966, tender of January dues was refused (Pet. App. 23; B.A. 35, 36, 45, 89, 90).

peared, McClain asked what the trouble was. Bart repeated the statement that he had made to Russell earlier and added that because McClain had not paid his fine, he could not work on the job. Bart, petitioner's steward at the site, then explained, "I am just doing my job." (Pet. App. 19-21; B.A. 34-35, 45, 50-51.) Russell thereupon asked McClain to leave the job until he got "straightened out" with the union. McClain left, and was not thereafter employed as a mason on that project (Pet. App. 20-21; B.A. 34-35, 52).

On January 25, 1966, McClain responded to the request of job superintendent Joseph Pannello that he report to another jobsite, where John Luther and Sons, Inc., was the general contractor (Pet. App. 24; B.A. 28-29).[4] When Kurt Keller, the steward for the union, observed McClain, he summoned the other masons on the job and told them: "Listen, McClain is on the job. Let's clean up the job and go in the shanty." Keller telephoned business agent Burke, and advised him of the action he had taken; Burke responded, "You did the right thing." (Pet. App. 24-25; B.A. 63-65.) When job superintendent Pannello learned that the masons had walked off the job, he asked Keller for an explanation, and Keller replied: "McClain is on the job. I took the masons off." Pannello then found McClain and told him: "You better leave the job to avoid a lot of this trouble." McClain then left that job site too (Pet. App. 25; B.A. 64, 55, 56).

---

[4] As a member of the Building Trades Employers Association of Rochester, Luther was also a party to the previously mentioned collective-bargaining agreement with petitioner union (Pet. App. 24; B.A. 28-29).

On the basis of this evidence and other testimony in the record, the Board concluded that petitioner had violated Section 8(b)(2) and (1)(A) of the Act by causing Wilmorite and Chloris to discharge McClain, and by inducing Luther to refuse him employment, because his union membership had been terminated for failure to pay a union fine (Pet. App. 23-25, 27). The Board further found that McClain was an "employee," and not a "supervisor", within the meaning of Section 2(11) of the Act, and thus protected by the Act (Pet. App. 16-17). The Board's order requires the union to cease and desist from the unfair labor practices found; to notify the companies involved that it has no objection to the employment of McClain; and to make him whole for any net loss of pay he may have suffered as a result of the discrimination against him (Pet. App. 11-12, 27-30). The court of appeals sustained the Board's findings and enforced its order (Pet. App. 31-32).

ARGUMENT

1. There is no substance to petitioner's primary contention (Pet. 5) that the Board's decision "proscribes the enforcement of internal, union discipline against a member * * *." Neither the Act nor the Board's decision would bar the union from disciplining McClain for failure to pay the fine imposed by the union so long as no attempt is made to affect his job rights. See *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175. The "policy of the Act is to insulate employees' jobs from their organizational rights" (*Radio Officers' Union* v. *National La-*

bor Relations Board, 347 U.S. 17, 40), and the Act accordingly provides that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee on the ground that his union membership has been terminated for any reason other than failure to tender ordinary periodic dues. Section 8(b)(2) (Pet. App. 9).[5] Thus, it is clear that a union, like petitioner, is forbidden to induce an employer to discriminate against an employee in order to compel compliance with some other union rule or policy relating to the acquisition or retention of membership. *National Labor Relations Board* v. *Industrial Union of Marine and Shipbuilding Workers*, No. 796, October Term, 1967, decided May 27, 1968; *Radio Officers' Union*, *supra*, 347 U.S. at 40-42; *National Labor Relations Board* v. *Spector Freight System*, 273 F. 2d 272 (C.A. 8), certiorari denied, 362 U.S. 962. Accordingly, the only issue genuinely presented is whether there is sufficient evidence to support the Board's finding, sustained by the court below, that the union caused McClain to be denied employment because his union membership had been terminated for failure to pay a union fine. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-

---

[5] This exception is permitted only when there is a valid union security agreement in effect and the member has failed to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. The Board found that McClain was not delinquent in these payments (*supra*, p. 3).

491. In any event, the facts summarized in the Statement (*supra*, pp. 2-5) show that there is ample support in the record as a whole to sustain the Board's finding.[6]

2. Contrary to petitioner's additional contention (Pet. 6-7), the Board and the court below did not misinterpret Section 2(11) of the Act in holding that McClain was not a supervisor. Section 2(11) of the Act defines a "supervisor," who is excluded from the Act's coverage, as:

> any individual having authority * * * to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board correctly applied those criteria here, and the record fully supports its conclusion, sustained by the court below, that McClain did not possess the authority and independent judgment required to make him a supervisor within the meaning of Section 2 (11).

Thus, while there is testimony that McClain on occasion was assigned to "oversee" a job when William

---

[6] The Board's finding does not rest wholly upon "circumstantial evidence" (see Pet. 5-6). But, even if it did, this would not render it invalid. See *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 660 (C.A. 2).

Wilson, the president of Chloris, was temporarily off the job site (Pet. App. 16-17; B.A. 59-60), McClain's function on these occasions was limited to routine direction of the work, such as telling the men where to start. Of the five to eight masons employed by Chloris, at least three others were directed by Wilson to oversee jobs in the same manner (Pet. App. 16-17; B.A. 46, 59, 60). Furthermore, when McClain or any of the other three "oversee" a job, they are still subject to Wilson's direction and exercise no independent discretion: "I tell them what to do and they go ahead and do it" (B.A. 60). Thus, even if the overseeing could be considered assigning or responsibly directing employees, it is clear that McClain was not authorized to make independent judgments.[7] In addition, McClain was paid the same hourly rate as that fixed by the collective bargaining agreement for the other masons (Pet. App. 16-17).

In cases like this, "the decisive question is whether [the individuals involved] have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in Section 2(11) of the Act." *National Labor Relations Board* v. *Brown & Sharpe Mfg. Co.*, 169 F. 2d 331, 334 (C.A. 1). Apart from the routine direction of work described above,

---

[7] The exercise of some supervisory tasks in a merely "routine", "clerical", "perfunctory", or "sporadic" manner does not elevate a rank and file employee to a supervisor. See *National Labor Relations Board* v. *Cousins Associates, Inc.*, 283 F. 2d 242, 243-244 (C.A. 2); *Poultry Enterprises, Inc.* v. *National Labor Relations Board*, 216 F. 2d 798, 801-802 (C.A. 5); *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 284, 289-290 (C.A. 4).

not materially different in responsibility from the task performed by the "lead men" on any work crew, nothing in the record indicates that McClain possessed any of those powers. Indeed, the president of the Chloris firm testified that McClain did not have the authority to fire employees (Pet. App. 16-17; B.A. 58; 59), and he replied with an emphatic, "No, no", when asked if there were any other supervisors employed by the company besides himself.[8] In this context, there can be no serious doubt that the Board was warranted in concluding that McClain was an "employee" rather than a "supervisor", and thus entitled to the protection of the Act.

---

[8] This portion of Wilson's testimony, which was inadvertently omitted from the printed appendix, is as follows:

* * * *

[121] WILLIAM WILSON

CROSS EXAMINATION

TRIAL EXAMINER: Do you have any other regular Supervisors—strike that. Besides yourself, do you have any other Supervisors employed by your Company or for them?

THE WITNESS: No, no. No foreman, no.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RONALD R. HELVESTON,
Attorney,
National Labor Relations Board.

JULY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 312892 15